

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 15, 2008

STATE OF TENNESSEE v. GARY DOUGHERTY

Direct Appeal from the Criminal Court for Sullivan County
No. S51334 Robert H. Montgomery, Jr., Judge

No. E2008-00131-CCA-R3-CD - Filed March 17, 2009

A Sullivan County jury convicted the Defendant, Gary Dougherty, of two counts of attempt to commit first degree murder and two counts of aggravated assault. The trial court merged all counts and sentenced the Defendant to twenty-two years as a standard offender in the Tennessee Department of Correction (“TDOC”). The Defendant appeals, contending: (1) the evidence is insufficient to sustain his convictions; and (2) the trial court erred when it enhanced his sentence. Having determined that we lack jurisdiction in this case, we dismiss the Defendant’s appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Richard A. Tate, Blountville, Tennessee, for the Appellant, Gary Dougherty.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Renee W. Turner, Assistant Attorney General; H. Greeley Wells, District Attorney General; and Kent Chitwood and Kaylin Hortenstine, Assistant District Attorney Generals, for the Appellee, State of Tennessee.

OPINION

I. Procedural History

This case arises from the Defendant’s attempt to kill the victim, his girlfriend, by preventing her from leaving the home they shared and stabbing her several times in her chest. The record reflects that in December 2005 a Sullivan County Grand Jury indicted the Defendant on two counts of attempt to commit first degree murder and two counts of aggravated assault. Following a jury trial, the Defendant was convicted and sentenced to twenty-two years in the TDOC. The Defendant filed a timely motion for new trial, and the trial court orally denied that motion on December 13, 2007. The trial court never entered a written order relating to the motion for a new trial. However, the record contains a minute entry, which reflects that the trial court denied the Defendant’s motion

for new trial on December 13, 2007. The Defendant filed his notice of appeal on January 10, 2008.

II. Analysis

On appeal, the Defendant contends that the evidence is insufficient to sustain his convictions and that the trial court erred when it enhanced his sentence. However, prior to reviewing the Defendant's contentions, we must first address the State's contention that this Court should dismiss the appeal for lack of jurisdiction because the record does not include a written order denying the motion for new trial.

The Tennessee Rules of Appellate Procedure require us to determine whether we have jurisdiction in every case on appeal. *See* Tenn. R. App. P. 13(b). In criminal cases, an appeal as of right lies from a final judgment of conviction. Tenn. R. App. P. 3(b). The appeal is initiated by filing a notice of appeal within thirty days of the final judgment date. Tenn. R. App. P. 4(a). In criminal actions, "if a timely motion or petition under the Tennessee Rules of Criminal Procedure is filed in the trial court by the defendant . . . under Rule 33(a) for a new trial, . . . the time for appeal for all parties shall run from entry of the order denying a new trial" Tenn. R. App. P. 4(c). Until the trial court denies the motion for new trial, this Court does not have jurisdiction over the case. *See e.g., State v. James Lee Foreman, II*, M2002-02595-CCA-R3-CD, 2004 WL 404696, at *2 (Tenn. Crim. App., at Nashville, Mar. 24, 2004) (dismissing appeal for lack of jurisdiction because appellate record did not contain a written order denying the motion for a new trial, a transcript of hearing on the motion for a new trial, or a document showing that the trial court denied the motion for a new trial), *no Tenn. R. App. P. 11 application filed*; *see also State v. Dorris Nell Jones*, No. M2007-00791-CCA-R3-CD, 2008 WL 544576, at *1-2 (Tenn. Crim. App., at Nashville, Feb. 27, 2008) (dismissing appeal for lack of jurisdiction because the record did not contain a motion for a new trial, the trial court's hearing on that motion, or an order denying the motion), *no Tenn. R. App. P. 11 application filed*; *State v. Terry Lynn Byington*, No. E2006-02069-CCA-R3-CD, 2007 WL 4167893, at *1-2 (Tenn. Crim. App., at Knoxville, Nov. 26, 2007) (dismissing appeal for lack of jurisdiction because the appellate record did not contain the motion for a new trial or written order that the motion for a new trial was denied), *Tenn. R. App. P. 11 application granted* (Tenn. June 14, 2008), *Tenn. R. App. P. 11 application granted again* (Tenn. July 14, 2008); *State v. Gregory O. Cherry*, No. W2006-00015-CCA-R3-CD, 2007 WL 2155740, at *1 (Tenn. Crim. App., at Jackson, July 27, 2007) (dismissing appeal for lack of jurisdiction because the record did not contain an order or transcript of any proceedings showing that disposition was made on the motion for a new trial), *no Tenn. R. App. P. 11 application filed*; *State v. Brent Tolbert*, No. M2006-01621-CCA-R3-CD, 2007 WL 2026623, at *1 (Tenn. Crim. App., at Nashville, June 28, 2007) (dismissing appeal for lack of jurisdiction because the trial court "never entered a written order denying the motion" for a new trial), *no Tenn. R. App. P. 11 application filed*.

We review the holdings in each of the aforementioned cases in part because on May 5, 2008, the Tennessee Supreme Court granted permission to appeal in *Byington*, one of the cases upon which we rely. In the order granting the appeal, the Supreme Court stated, "For oral argument, the Court is particularly interested in the following issue: Whether appellate jurisdiction can be converted through a minute entry indicating denial of the motion for new trial, without the entry of a separate

written order.”

The record in this case, unlike some of the aforementioned cases, contains a copy of the motion for new trial as well as a transcript of the hearing on that motion. The record does not contain a written order, signed by the trial court, denying the motion for new trial. The record does contain what appears to be a minute entry indicating that the trial court denied the motion for new trial on December 13, 2007. The minute entry, however, does not bear the signature of the trial judge.

While we anticipate that the Supreme Court in *Byington* will soon provide guidance, we conclude that, pursuant to the current state of the law, a written order disposing of the motion for a new trial or a minute entry disposing of the motion and bearing the signature of the trial judge is required to confer upon this court jurisdiction over this appeal. *See State v. Eric Condrell O’Neal*, No. M2007-02885-CCA-R3-CD, 2008 WL 4756459, at *2 (Tenn. Crim. App., at Nashville, Oct. 28, 2008), *no Tenn. R. App. P. 11 application filed*; *State v. Perry A. March*, No. M2006-02732-CCA-R3-CD, 2008 WL 2743752, at *2 (Tenn. Crim. App., at Nashville, July 15, 2008), *no Tenn. R. App. P. 11 application filed*; and *see State v. Kim McBride Murphy*, No. E2007-02647-CCA-R3-CD, 2008 WL 4614323, at *2 (Tenn. Crim. App., at Knoxville, Oct. 17, 2008), *no Tenn. R. App. P. 11 application filed*; *State v. Kevin Allen Gentry*, E2007-02029-CCA-R3-CD, 2008 WL 2938040, at *2 (Tenn. Crim. App., at Knoxville, July 30, 2008), *no Tenn. R. App. P. 11 application filed*. Because the record contains no such order or minute entry, we dismiss this appeal for lack of jurisdiction.

III. Conclusion

For the foregoing reasons, the appeal is dismissed.

ROBERT W. WEDEMEYER, JUDGE